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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SONY CORPORATION,

Plaintiff,

v.

VIZIO, INC.,

Defendant.

Case No. CV-08-01135-RGK(FMOx)

DISCOVERY MATTER

**JOINT STIPULATION
REGARDING VIZIO, INC.'S
MOTION TO COMPEL EXPERT
REPORTS AND DEPOSITIONS,
AND TO COMPEL DEPOSITIONS
OF SONY WITNESSES IN THE
UNITED STATES**

**MAGISTRATE JUDGE: HON.
FERNANDO M. OLGUIN**

**HEARING: 10:00 A.M. ON
SEPTEMBER 2, 2009 AT 312 N.
SPRING ST., 9th FLOOR,
COURTROOM F**

**DISCOVERY CUT-OFF DATE:
NOVEMBER 1, 2009**

**PRETRIAL CONFERENCE DATE:
JANUARY 10, 2010**

TRIAL DATE: JANUARY 26, 2010

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1 Pursuant to Fed. R. Civ. P. 37(a) and Local Rule 37-2.1, Defendant Vizio,
2 Inc. (“Vizio”) and Plaintiff Sony Corporation (“Sony”) submit the following joint
3 stipulation in connection with Vizio, Inc.’s Motion to Compel Expert Reports and
4 Expert Depositions and Depositions of Sony Witnesses in the United States.

5 **I. INTRODUCTION**

6 **A. VIZIO’S INTRODUCTORY STATEMENT**

7 This is a patent infringement case, involving ten patents that relate to
8 television technology.¹ Moreover, Sony has asserted over one hundred patent
9 claims, and has accused hundreds of Vizio products of infringement. As the parties
10 prepare this large and complex case for trial – currently scheduled for January 26,
11 2010 – it is clear that several major issues must be resolved. First, there is no
12 schedule set for the orderly exchange of expert reports or expert discovery. Vizio
13 believes that such a schedule is necessary to properly frame for trial the many
14 detailed issues involving expert testimony. Second, many of the named inventors
15 on the Sony patents are residents of Japan. Having chosen this forum and having
16 successfully won a venue transfer motion permitting it to pursue its claims here
17 rather than in the District of New Jersey, Sony should be required to bring its Rule
18 30(b)(6) witnesses and its fact witnesses – including inventors – to Los Angeles for
19 their depositions. This is especially so because in arguing for transfer to this
20 District, Sony relied on the fact that Los Angeles was a more convenient forum for
21 its witnesses, including those in Japan. Sony should not now be heard to claim
22 otherwise. Vizio’s positions are presented below along with Sony’s counter
23 arguments.

24 **1. Expert Reports And Depositions**

25 Rule 26 of the Federal Rules of Civil Procedure requires the submission of
26 expert reports for any “witness . . . retained or specially employed to provide expert
27

28 ¹ In addition, the consolidated case, No. 09-cv-01043, involves four other Sony patents.

1 testimony,” unless otherwise ordered by the Court. Such reports “must contain a
2 complete statement of all opinions the witness will express and the basis and
3 reasons for them.” *Id.* Unless otherwise ordered by the Court, expert reports “must
4 be made at least 90 days before the date set for trial.” *Id.* Experts may be deposed
5 by any party, but only “after the report is provided.” *Id.*

6 In accordance with Rule 26 and in view of the complexity of this case, Vizio
7 proposed that the parties exchange opening expert reports on November 2, 2009,
8 approximately 90 days before trial, followed by rebuttal expert reports on
9 November 30, 2009. Vizio also proposed conducting expert depositions in
10 December, 2009. Vizio’s proposal was made in an effort to ensure that the parties
11 are able to conduct expert discovery in an efficient and orderly manner in advance
12 of trial in January 2010, and to also ensure an efficient and orderly trial.

13 Even though Sony has acknowledged that “expert... discovery [is] likely to
14 be needed[]” in this case (Dkt. #44 at 5), Sony refused to agree to any schedule for
15 the exchange of expert reports and expert depositions before the Final Pre-Trial
16 Conference on January 10, 2010. According to Sony, proposed expert testimony
17 should be disclosed only by means of an exchange of short narrative descriptions of
18 the testifying experts’ qualifications and proposed testimony ***two weeks before***
19 ***trial***, leaving virtually no time to conduct expert depositions before trial.

20 Sony’s proposal simply will not work. This is a complex case involving
21 infringement, invalidity, and damages issues under a large number of patents. As is
22 the norm with patent cases, extensive expert testimony will be required on these
23 issues, and it would be both impractical and inefficient to limit expert disclosures to
24 the exchange of narrative statements two weeks before trial. Under Sony’s
25 proposal, there would not be enough time for the parties to prepare their case for
26 trial or even take depositions of the experts in the two short weeks remaining prior
27 to the beginning of trial. The Court’s Scheduling Order clearly does not preclude
28 the parties from following the usual practice under Rule 26 of exchanging detailed

1 expert reports earlier in the case. Indeed, the Court's Scheduling Order even
2 references such reports. Accordingly, in order for the parties to prepare for trial in
3 an orderly manner, Vizio's proposal for expert discovery should be adopted.

4 **2. Location Of Depositions Of Sony Witnesses**

5 Sony is refusing to make itself and its witnesses available for Rule 30(b)(6)
6 and Rule 30(b)(1) depositions in the United States. It was Sony, not Vizio, who
7 chose to file suit in this District, and Sony's position ignores the general rule that a
8 plaintiff is required to appear for deposition in the venue in which it filed suit.
9 Moreover, Sony successfully argued that this case should be transferred to this
10 District from the District Court of New Jersey based in part on the convenience of
11 this District for its Japanese witnesses. Having done so, Sony cannot refuse to
12 make its 30(b)(6) corporate designees and inventor witnesses available for
13 deposition here.

14 There are also a number of convenience factors that weigh heavily in favor of
15 conducting depositions of Sony's witnesses in this District, including the facts that
16 both parties' counsel are located here, that Sony personnel travel to the United
17 States and, most importantly, that the Court will be able to effectively manage any
18 disputes that might arise if the depositions are held here. Presumably, this is why
19 Sony argued that trial in Los Angeles would be more convenient to its witnesses.

20 Sony's refusal to produce its witnesses in the venue in which it filed suit
21 finds no support in the Court's Scheduling Order. Although Sony attempts to base
22 its refusal to produce its witnesses here on the fact that the Court did not adopt
23 Vizio's proposal regarding the location of depositions, Sony overlooks the fact that
24 the Court did not accept Sony's proposal either. The Court simply has never
25 addressed the issue of deposition location. As Vizio demonstrates below in more
26 detail, Sony's witnesses should be deposed here, not in Japan.

27 **B. SONY'S INTRODUCTORY STATEMENT**

28 As set forth in the Court's April 6 Order, the Court did not adopt Vizio's

1 proposal that certain depositions of Japan-based witnesses occur in this District.
2 Even so, Sony has every intention of making its 30(b)(6) witnesses available for
3 deposition in the United States. Vizio would have learned of Sony's position had it
4 engaged in the mandatory Local Rule 37-1 meet and confer process.² Instead,
5 Vizio sidestepped that requirement and chose to unilaterally request a blanket order
6 requiring Sony to bring *all* of its Japan-based witnesses, including the nine Japan-
7 based inventors Vizio has noticed for deposition, to this District.³

8 In making its unfair and overreaching request, which is not supported by the
9 case law, Vizio ignores important considerations such as the relevance of the
10 witness' anticipated testimony, as well as the relative costs and efficiencies of
11 having one or two lawyers for each side fly to Japan to conduct depositions
12 efficiently over a number of days compared to bringing to California a large group
13 of Japan-based inventors (and presumably other witnesses as discovery proceeds).
14 Furthermore, that Sony brought suit in the Central District based on a related action
15 does not support the relief Vizio seeks. The blanket order Vizio requests is unduly
16 burdensome and does not make sense here.

17 Vizio admits that in the parties' Joint Rule 26(f) Report, it agreed that except

18 ² Vizio is incorrect in asserting Sony indicated in a July 24, 2009 letter that
19 it would not produce its 30(b)(6) witnesses in the U.S. To the contrary, although
20 Sony is generally willing to provide 30(b)(6) witnesses on topics relating to the
21 patents-in-suit, Sony informed Vizio that if it wanted the personal deposition
22 testimony of the Japan-based named inventors, it should take their individual
23 depositions in Japan, and not try to rely on an omnibus 30(b)(6) notice to obtain
24 that testimony.

25 ³ Vizio, in contrast, has not expressed a willingness to make witnesses
26 and other discovery available in the U.S. from its Taiwan-based affiliate, AmTRAN
27 Technology Co., Ltd. ("AmTRAN"), which manufactures the majority of the Vizio
28 TVs accused of infringement and ships them directly to Irvine, California for
distribution by Vizio. (Bellville Decl. Ex. B at V0000019862.) AmTRAN holds a
23% ownership interest in Vizio, is believed to be indemnifying Vizio, and
participated in the parties' pre- and post-suit settlement meetings. (*Id.*, Bellville
Decl. Ex. C at V0000046727.) Yet Vizio recently informed Sony that it must look
directly to AmTRAN if it wants discovery from that company. (Belville Decl. Ex.
A.) The parties will not be on an equal footing in discovery if Sony is required to
go to Taiwan for depositions from AmTRAN while Vizio can obtain discovery
directly from Sony in California.

1 for Sony witnesses who reside in Japan, party depositions may be taken where the
2 witnesses reside.⁴ As a result, the last sentence in Section III.C.3., in which Vizio
3 requests that Sony “be compelled to make its 30(b)(6) and 30(b)(1) witnesses
4 available for deposition in this District,” is either a misstatement or an attempt to
5 renege on Vizio’s written representation to this Court that it would not seek to
6 depose Sony witnesses who reside in the U.S. to come to this District for
7 deposition. In either case, that request should be rejected.

8 It also bears emphasis that Vizio's motion, by its plain terms, applies only to
9 the patent-infringement portion of this action, in which Sony is the plaintiff. A
10 recently served deposition notice related to Vizio’s product disparagement claims
11 that seeks the deposition of a senior Japanese executive will be addressed at a later
12 time.⁵

13 With respect to expert reports, Vizio's "motion to compel" is more accurately
14 a motion for reconsideration of the Court’s April 6, 2009 Order for Jury Trial (Doc.
15 No. 48). Vizio failed to persuade Judge Klausner to adopt a schedule requiring the
16 exchange of formal expert reports before the Pretrial Conference, and it now seeks
17 to impose the very same expert report schedule through a Local Rule 37-1
18 discovery motion. The parties’ Joint Rule 26(f) Report contained the parties’
19 competing proposals for the disclosure of expert opinions. (Doc. No. 44 at 4-5, 9).
20 Sony proposed that the Court adopt the same protocol previously adopted in *Sony*
21 *Corporation v. Westinghouse Digital Electronics, LLC*, NO. CV 08-03934-RGK
22 (FMOx), a case that involved many of the same patents at issue here. Specifically,

23 ⁴ In fact, the rules require depositions to occur within 100 miles of a witness’
24 residence.

25 ⁵ On Friday, August 7, three days after serving its half of this joint
26 stipulation, Vizio served deposition notices in connection with the product
27 disparagement portion of this case, in which Sony is the defendant. One of those
28 notices seeks the deposition in Los Angeles of Sony Corporation's Chief Financial
Officer, who lives and works in Japan. Sony intends to meet-and-confer with Vizio
about the deposition notice and, if necessary, to file a motion for a protective order.
That deposition raises significantly different factual and legal issues. Accordingly,
any consideration of that notice as part of this motion would be premature.

1 Sony proposed that the parties exchange formal expert reports at the Final Pre-Trial
2 Conference as well as short narrative statements regarding the qualifications of the
3 experts and their expected testimony. (Doc. No. 44 at 4). Vizio requested earlier
4 exchanges of opening and rebuttal expert reports on issues for which the party bears
5 the burden of proof. (*Id.* at 5.) Vizio's rationale was the same as it advances now,
6 that this case is technically complex. (*Id.*) In its April 6, 2009 Order, the Court
7 adopted Sony's proposal and ordered the parties to exchange at the Final Pre-Trial
8 Conference short narrative statements of expert qualifications and expected
9 testimony along with any expert reports that have been prepared. (Doc. No. 48 at
10 3). Vizio offers no good reason to depart from that schedule now.

11 For these reasons, both portions of Vizio's motion should be denied.

12 **II. DISCOVERY IN DISPUTE AND EFFORTS TO RESOLVE THOSE**
13 **DISPUTES THROUGH MEET AND CONFERS**

14 **A. VIZIO'S STATEMENT REGARDING DISCOVERY IN**
15 **DISPUTE**

16 **1. Expert Reports And Expert Depositions**

17 The parties have complied with the meet and confer requirements of Local
18 Rule 37-1 with respect to expert reports and depositions. The parties' meet and
19 confers regarding expert reports and depositions date back to at least February 27,
20 2009, when the parties held a meet and confer to discuss scheduling issues. The
21 parties met and conferred again on March 12, 2009 to discuss these issues further.
22 Because the parties were unable to reach an agreement on this subject, they
23 submitted a Rule 26(f) Report with competing proposals on March 30, 2009.
24 Thereafter, the Court issued a Scheduling Order that did not address the issue of
25 whether the parties were to exchange expert reports in the manner contemplated by
26 Rule 26(a)(2). The Scheduling Order requires the parties to provide "short
27 narrative statements" for any expert witness who will provide trial testimony at the
28 Pre-Trial Conference. (Dkt. #48 at 3.) The Court's Order does not address whether
the normal procedure of Rule 26 providing for an exchange of detailed expert

1 reports followed by expert depositions well in advance of the Pre-Trial Conference
2 will be followed. Indeed, at the scheduling conference, the Court encouraged the
3 parties to work together to resolve issues such as this one on which they had been
4 unable to reach agreement.

5 Following the advice of the Court, on July 8, 2009, Vizio requested an in-
6 person meet-and-confer with Sony regarding, *inter alia*, a schedule for exchanging
7 expert reports and conducting expert discovery. (Ex. 1.)⁶ Sony responded on July
8 16, 2009, and stated that Vizio's request did not set forth any position regarding the
9 schedule for expert discovery, but that Sony would be willing to discuss the issue of
10 expert discovery in an informal manner. (Ex. 2.)

11 The parties discussed expert discovery in a July 17, 2009 meet and confer.
12 (Ex. 3, July 17, 2009 M&C Tr.) Vizio proposed "that [the parties] exchange
13 opening expert reports on November 2nd, and that [the parties] exchange rebuttal
14 reports on November 30th, and then [the parties] would do expert depositions in the
15 month of December" (*Id.* at 22:3-7.) Vizio expressed concern that "given the
16 [case] schedule . . . we obviously can't do [expert discovery] any later than that
17 because we have got a trial in January." (*Id.* at 22:10-12.) Based on the parties'
18 correspondence, Vizio noted that "it wasn't even clear . . . whether or not Sony was
19 going to be willing to engage in formal expert reports and discovery." (*Id.* at 22:24-
20 23:2.) Sony responded that it would "consider [the proposed expert discovery] and
21 get back to [Vizio]." (*Id.* at 22:16-17; *see also id.* at 23:11-13.)

22 On July 21, 2009, Vizio requested another in-person meet-and-confer to
23 discuss expert reports and expert discovery. (Ex. 4.) Vizio repeated that "these are
24 issues that need immediate attention, and if not resolved this week, will have to be
25 brought to the attention of the Court." (*Id.*) Sony responded on July 22, 2009,
26 stating that it "would be happy to discuss the issue in an informal manner, after the
27

28 ⁶ References to Vizio's exhibits refer to those attached to the Declaration of
Steven Corr, attached hereto.

1 transcribed portion of the parties' meet-and-confer [on July 23, 2009]." (Ex. 5.)
2 During that meet and confer, Sony indicated it still needed more time to consider
3 Vizio's proposal, but would have an answer by July 29, 2009. On July 29, 2009,
4 the parties held another meet and confer, at which time Sony rejected Vizio's
5 proposal, and stated that it would not agree to provide expert reports or conduct any
6 expert discovery apart from the disclosure of narrative statements at the Final Pre-
7 Trial Conference, scheduled to take place on January 10, 2010.

8 In view of the foregoing, Vizio is forced to seek assistance from the Court to
9 resolve this issue. Specifically, Vizio asks the Court to set a schedule by which the
10 parties simultaneously exchange opening expert reports on November 2, 2009
11 setting forth the detailed bases supporting each party's contentions on issues for
12 which each party bears the burden of proof, followed by rebuttal expert reports on
13 November 30, 2009 setting forth the detailed bases supporting each party's
14 contentions on issues for which it does not bear the burden of proof. Vizio further
15 requests that the Court enter an order permitting expert depositions to be taken
16 during the month of December, 2009.

17 **2. Depositions of Sony Witnesses in the United States**

18 The parties have complied with the meet and confer requirements of Local
19 Rule 37-1 with respect to location of depositions. As with expert reports and
20 discovery, the parties began meeting and conferring regarding the location of
21 depositions at least as early as February 27, 2009, when the parties held a meet and
22 confer to discuss scheduling issues. The parties met and conferred again on March
23 12, 2009 to discuss these issues further. Prior to and after these meet and confers,
24 the parties discussed and exchanged written proposals regarding the location of
25 depositions. Unfortunately, the parties were unable to reach an agreement on this
26 issue and submitted competing positions in the Rule 26(f) Report. In that Report,
27 Vizio stated that it
28

1 agree[d] that the party depositions may be taken where
2 the witnesses reside, except for those Sony witnesses who
3 reside in Japan. . . . VIZIO expects that Sony, as the
4 plaintiff in this action, will agree to produce its witnesses
5 who reside in Japan for deposition in the United States in
6 order to obviate the delay associated with the need for the
7 depositions to be taken in the U.S. Consular office in
8 Tokyo, Japan. In the event that Sony does not agree to
9 produce these witnesses in the United States, VIZIO
10 requests that this Court require Sony to produce them for
11 deposition in the United States, which will simplify and
12 streamline the deposition process.

13 (Dkt. #44 at 13.) Sony “propose[d] that depositions be conducted in [a] specific
14 witness’ country of residence. To the extent Plaintiff [sic] seeks to take depositions
15 in Japan, those depositions will need to be taken at a U.S. embassy.” (*Id.* at 11.)
16 Sony also stated that “Sony believe[d] that, absent any agreement during discovery,
17 the parties in this case should produce their witnesses where the witnesses are
18 located.” (*Id.* at 12.)

19 The Court issued its Scheduling Order on April 6, 2009 (Dkt. #48), but did
20 not make any specific ruling with regard to the location where depositions were to
21 take place. (*See id.* at 2:8-10 (“All depositions shall be scheduled to commence
22 sufficiently in advance of the discovery cut-off date to permit their completion and
23 to permit the deposing party enough time to bring any discovery motion concerning
24 the deposition prior to the cut-off date.”).) This was not unexpected, as the Court
25 encouraged the parties during the Case Management Conference to work together
26 in an effort resolve these issues and others.

27 Following the Court’s advice, on June 9, 2009, Vizio sent a letter to Sony
28 asking Sony to “please advise whether Sony plans to make its witnesses (*e.g.*, the
inventors) available for deposition in the United States.” (Ex. 6.) Vizio proposed
“having the Vizio employee deponents deposed in the Irvine, California office of
Jones Day and the Sony witnesses (at least those resident in Japan) deposed in the
Los Angeles office of Quinn Emmanuel Urquhart Oliver & Hedges, LLP.” (*Id.*)

1 Sony responded on June 19, 2009 and stated that “as previously stated, Sony will
2 make its witnesses available in their country of residence.” (Ex. 7 at 1.)

3 On July 17, 2009, Vizio served a Rule 30(b)(6) notice on Sony along with
4 Rule 30(b)(1) notices for a number of Sony employees, including several of the
5 named inventors in Japan. These depositions were noticed to take place at the
6 offices of Vizio’s counsel in Los Angeles, California.

7 A week later, on July 24, 2009, Sony responded to the deposition notices in a
8 letter stating that “Sony long ago provided Vizio with notice that the depositions of
9 the inventors residing in Japan – who Sony identified at the outset of this case as
10 having relevant information – would need to take place in their country of residence
11 at a U.S. Embassy.” (Ex. 8 at 1.) Sony indicated that its position regarding the
12 location of depositions of Sony witnesses was “*crystal clear[]*” and *had been for*
13 *“nearly four months”* (*Id.*) Sony concluded by stating that “[i]f Vizio cannot
14 confirm that it has taken the necessary steps and that it will agree to proceed first
15 with the depositions of fact witnesses in Japan without derailing the Court’s trial
16 schedule, Sony will be forced to seek protection from the Court.” (*Id.* at 4)

17 The parties have made numerous attempts over the last several months to
18 resolve this issue and are clearly at an impasse. It has become clear from Sony’s
19 latest correspondence that there is no chance of resolving this issue absent
20 intervention from the Court. Indeed, in its most recent correspondence on this
21 subject Sony emphasized that its position was “crystal clear” – and had been for
22 months – that it would not under any circumstances be making itself or any of its
23 witnesses available for deposition in the United States. (Ex. 8.) Vizio believes that
24 Sony, as plaintiff in this action, and the party that fought for this District, must
25 make itself and its witnesses available for deposition in the United States. Given
26 that the parties are clearly at an impasse on this issue, and there is no hope of
27 resolving it without guidance from the Court, Vizio had no choice but to seek
28 guidance from the Court now to resolve this pressing issue. The depositions at-

1 issue have been noticed for August and September 2009, and October 2009 is the
2 last month of discovery.

3 **B. SONY'S STATEMENT REGARDING DISCOVERY IN**
4 **DISPUTE**

5 **1. Expert Reports and Expert Depositions**

6 The Court has already rejected Vizio's expert discovery protocol in favor of
7 Sony's proposal. The parties first discussed their expert discovery positions during
8 two telephone conversations in February and March, 2009 that centered on
9 preparation of the parties' Rule 26(f) Report. (Belville Decl. ¶¶ 2, 3.) Vizio's
10 proposal in the Report was identical to the relief it seeks now and contemplated that
11 the parties "serve opening expert reports on the same day" and rebuttal expert
12 reports "a set number of days later." (Docket No. 44 at 5.) Sony's proposal
13 followed the Court's normal practice and required the parties to exchange expert
14 reports at the Final Pre-Trial Conference, and exchange "short narrative statements"
15 regarding each testifying expert's qualifications and expected testimony. (*Id.* at 4.)

16 In its April 6, 2009 Order for Jury Trial (Doc. No. 48 at 3), the Court adopted
17 Sony's proposal, specifically ordering that expert reports, if prepared, "*shall be*
18 *exchanged at the Final Pre-Trial Conference.*" (Docket No. 48 at 3.) The Court
19 also ordered the exchange of short narrative statements describing an expert
20 witness's qualifications and expected testimony. (*Id.*)

21 **2. Depositions of Sony Witnesses in the United States**

22 Vizio has *not* complied with the meet and confer requirements of Local Rule
23 37-1 with respect to the location of depositions. In violation of Local Rule 37-1,
24 not only have the parties *never* met in person to discuss the location of depositions,
25 Vizio has never even sent Sony a letter requesting such a conference. (Belville
26 Decl. ¶¶ 5, 6.)

27 Vizio makes much of the parties' two telephone conversations in February
28 and March 2009. But those conversations involved the parties' Joint Rule 26(f)

1 Report and had nothing to do with any Rule 37 dispute. (Belville Decl. ¶ 3.)
2 Moreover, Local Rule 37-1 requires the conference to occur "in person" if both
3 counsel are located within the same county, which is the case here. (Belville Decl.
4 ¶ 8.) Local Rule 37-1 further requires the moving party to serve a letter requesting
5 a conference of counsel and identifying the dispute and the party's position
6 regarding the dispute. As is clear from Vizio's portion of the Joint Stipulation, (*see*
7 *supra* Section II.A.2), Vizio sent no such letter prior to the February and March
8 telephone discussions. (Belville Decl. ¶ 4.) In fact, the parties have not had any
9 meet and confers about this issue for over five months, and the last occurred before
10 Vizio served the deposition notices at issue. (Belville Decl. ¶ 9.) Given Vizio's
11 clear violation of Local Rule 37, Vizio's motion should be denied on that basis
12 alone. *Diagnostic Systems Corp. v. Symantec Corp.*, Case 8:06-cv-1211-DOC-AN
13 (C.D.Cal.)(Dkt. No. 673)(denying motion to compel for failure to comply with or
14 cooperate in the foregoing procedures, noting such failure may result in imposition
15 of sanctions.)

16 If Vizio had fulfilled its Rule 37-1 obligations, Vizio would have learned that
17 Sony will make its Rule 30(b)(6) witnesses available in the U.S. (Belville Decl. ¶
18 10.) Vizio attempts to rely upon a July 29 letter from Sony, but that letter simply
19 informed Vizio that Sony would not agree that Vizio could misuse 30(b)(6) topics
20 to evade deposition limits and obtain fact testimony from Sony's inventors. Sony
21 pointed out that if Vizio wanted to depose Sony's Japan-based inventors, it should
22 do so in Japan. Nothing in that letter supports Vizio's statement that "Sony is
23 refusing to make itself and its witnesses available for Rule 30(b)(6) and Rule
24 30(b)(1) depositions in the United States." (Corr Decl. Ex. 8.)
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III. THE PARTIES' POSITIONS REGARDING DISPUTED DISCOVERY

A. VIZIO'S POSITION REGARDING EXPERT REPORTS AND EXPERT DEPOSITIONS

1. Vizio's Proposed Schedule For Expert Discovery Should Be Adopted

Expert discovery regarding the complex technological issues in this case is necessary, as it is in virtually every high-technology patent case. Indeed, Sony itself acknowledged its “belie[f] that expert . . . discovery [is] likely to be needed[.]” in the parties’ Joint Rule 26(f) Report. (Dkt. #44 at 5:18-19.) A trial in this case will require that each side present extensive opinion testimony on the detailed limitations of each patent claim at issue – whether in reference to the accused products, the prior art or other issues. Yet Sony refuses to agree to make its expert positions known to Vizio prior to the exchange of the “short narrative statement” of the expected testimony to be provided at the Pre-Trial Conference. This refusal to agree to engage in meaningful pretrial expert disclosure and discovery is unworkable in a case that will depend so heavily on expert testimony.

To that end, Vizio proposed the following schedule: exchange of opening expert reports on November 2, 2009; exchange of rebuttal expert reports on November 30, 2009; and expert depositions to take place in December 2009. The Final Pre-Trial Conference will take place soon after, on January 10, 2010, followed by Trial, which is set to begin on January 26, 2010. With so many patents, claims, claim limitations and accused products, an earlier and more orderly expert disclosure and discovery process would allow the parties to be better prepared and would minimize surprises and permit trial time to be used most efficiently.

Vizio’s proposed expert discovery schedule is reasonable and in direct compliance with Rule 26(a)(2) of the Federal Rules of Civil Procedure, which states in relevant part:

(A) [A] party must disclose to the other parties the identity of any

1 [expert] witness it may use at trial to present evidence . . .

2 (B) Unless otherwise stipulated or ordered by the court, this
3 disclosure **must** be accompanied by a written report . . . [which]
4 **must** contain:

5 (i) a complete statement of all opinions the witness will
6 express and the basis and reasons for them.

7 (C) Absent a stipulation or a court order, the disclosures **must** be
8 made:

9 (i) ***at least 90 days before the date set for trial***

10 (Fed. R. Civ. P. 26(a)(2)(A), (B) and (C) (emphasis added).) Vizio’s proposal also
11 complies with Rule 26(b)(4), which provides that expert depositions “may be
12 conducted only ***after*** the report is provided.” (Fed. R. Civ. P. 26(b)(4)(A)
13 (emphasis added).)

14 The 1993 Advisory Committee comments to Rule 26(a)(2)(A) and (B)
15 provide additional insight on the importance of exchanging expert reports and
16 conducting expert depositions in an orderly manner. For example, the Advisory
17 Committee noted the general purpose of requiring disclosure of expert testimony
18 “sufficiently in advance of trial [is so] that opposing parties have a reasonable
19 opportunity to prepare for effective cross examination and perhaps arrange for
20 expert testimony from other witnesses.” (Fed. R. Civ. P. 26(a)(2) advisory
21 committee’s notes.) Normally, the Committee stated, the court should prescribe a
22 time for the exchange of proposed expert testimony and, in most cases, the party
23 bearing the burden of proof on an issue should disclose its expert testimony first.
24 (*Id.*) The Committee further stated that, at a minimum, “the disclosures are to be
25 made by all parties ***at least 90 days before the trial date*** or the date by which the
26 case is to be ready for trial,” with the exception of rebuttal expert reports. (*Id.*
27 (emphasis added).) The Committee also explained that full disclosure of proposed
28 expert testimony in a written report was so critical that opinions not expressed in
the report could be excluded under Rule 37(c)(1) and Fed. R. Evid. 702. (*Id.*)
Finally, the Committee noted that expert depositions – which “have become

1 standard[]” – were to take place *after* exchanges of expert reports, so that the
2 deposing party would have a reasonable understanding of the expert’s opinion,
3 greatly reducing the length of expert depositions. (*Id.* (emphasis added).)

4 Vizio’s proposed expert discovery schedule permits the parties a reasonable
5 amount of time in advance of trial to discover, analyze, explore and define all the
6 expert opinions that will be expressed, by either party, in this case. *See*
7 *Philadelphia Nat’l Bank v. Dow Chem. Co.*, 106 F.R.D. 342, 343 (E.D. Pa. 1984)
8 (granting motion to compel exchange of expert reports, “emphasiz[ing] that expert
9 testimony at trial will be circumscribed by the information produced . . . and . . .
10 urg[ing] all parties to provide candid and comprehensive reports.”). With a
11 complete picture of all experts’ opinions, the parties can focus their efforts on
12 preparing their cases for trial in an efficient and orderly manner. Indeed, orderly
13 and efficient expert discovery, along the lines of Vizio’s proposal, is contemplated
14 by the Federal Rules of Civil Procedure and plays an important role in almost every
15 patent case. *See* Fed. R. Civ. P. 26(a)(2)(A)-(D), 26(b)(4)(A); *see also, e.g.*,
16 *Innogenetics, N.V. v. Abbott Labs.*, 512 F.3d 1363, 1375 (Fed. Cir. 2008) (noting
17 that, absent a report setting forth “proposed content of . . . expert testimony, [the
18 opposing party] would not have been able to prepare an adequate deposition or
19 cross-examination.”).

20 This Court in prior cases has ordered the type of expert discovery schedule
21 that Vizio is proposing. For example, in *Katz Interactive Call Processing*, the
22 Court adopted a schedule that permitted the parties to exchange opening expert
23 reports (February 29, 2008), rebuttal reports (March 21, 2008) and expert
24 depositions (February 29-April 14, 2008) near the end of fact discovery. Order No.
25 4 at 2, No. 2:07-ml-01816-RGK-FFM, [Dkt. #705] (C.D. Cal. Nov. 30, 2007) (Ex.
26 9.) Vizio requests that the same type of schedule be entered here.

1 **2. Sony Has Failed To Offer Any Reasonable Schedule For**
2 **Expert Discovery In Advance Of Trial**

3 Sony apparently opposes any expert discovery or even any disclosure of
4 expert opinions prior to the Pre-Trial Conference scheduled for January 10, 2010.
5 Under Sony's proposed timeline, the only information that parties would be
6 required to provide is to "exchange the required short narrative statements of the
7 qualifications of the expert and the testimony expected to be elicited at trial" and
8 nothing more. To the extent there are any deficiencies in the parties' exchanges of
9 proposed testimony, there will not be sufficient time for the parties to file motions
10 to compel in advance of trial. *See Intercargo Ins. Co. v. Burlington N. Santa Fe*
11 *R.R.*, 185 F. Supp. 2d 1103, 1107 (C.D. Cal. 2001) (denying motion to exclude
12 experts because opposing party did not seek to compel more adequate disclosure of
13 expert testimony within a reasonable time of service of expert reports). More
14 importantly, if no expert disclosures are provided until two weeks before trial, there
15 will be no time for expert depositions prior to trial in contravention of Rule 26(b)(4)
16 of the Federal Rules of Civil Procedure. *See Innogenetics*, 512 F.3d at 1375.

17 **B. SONY'S POSITION REGARDING EXPERT REPORTS AND**
18 **EXPERT DEPOSITIONS**

19 This Court has already rejected Vizio's position regarding the timing of
20 expert discovery. In the parties' Joint Rule 26(f) Report, Vizio asked the Court to
21 adopt a schedule requiring two rounds of expert reports:

22 VIZIO proposes that the parties agree that two rounds of
23 expert reports should be served by each side after the
24 close of fact discovery. Specifically, each side shall serve
opening expert reports on the same day on issues for
which they bear the burden of proof. Rebuttal expert
reports shall then be exchanged a set number of days
later.

25 (Docket No. 44 at 5.) Vizio further proposed that opening expert reports be due 30
26 days from the issuance of a claim construction opinion, and that rebuttal reports be
27 due 30 days thereafter. (*Id.* at 9.) In contrast, Sony proposed as follows:

28 Sony proposes that the parties adopt the requirements set

1 forth by the Court in the *Westinghouse* action.⁷
2 Specifically, if expert witnesses are to be called at trial,
3 the parties shall exchange at the Final Pre-Trial
4 Conference short narrative statements of the qualifications
5 of the expert and the testimony elicited at trial. If reports
6 for experts to be called have been prepared, they shall be
7 exchanged at the Final Pre-Trial Conference but shall not
8 substitute for the narrative statements required.

9 (*Id.* at 4.)

10 In its April 6, 2009 Order for Jury Trial, this Court rejected Vizio's proposal
11 in favor of Sony's. Using the same language as in the *Westinghouse* case, the
12 Court's order stated:

13 If expert witnesses are to be called at trial, the parties
14 shall exchange at the Final Pre-Trial Conference short
15 narrative statements of the qualifications of the expert and
16 the testimony expected to be elicited at trial. ***If reports of***
17 ***experts to be called at trial have been prepared, they***
18 ***shall be exchanged at the Final Pre-Trial Conference***
19 but shall not substitute for the narrative statements
20 required.

21 (Docket No. 48 at 3 (emphasis added); 9/15/2008 Order, Case No. 2:08-cv-03934-
22 RGK-FMO (Docket No. 13).) Given the Court already rejected Vizio's proposal
23 that expert reports be exchanged before the Final Pre-Trial Conference, there is no
24 need for the Court to reconsider that schedule now.

25 Vizio argues that Federal Rule of Civil Procedure 26(a)(2) and the
26 corresponding 1993 Advisory Committee comments support its position that expert
27 reports should be exchanged at least 90 days before the trial date. Vizio, however,
28 ignores Rule 26(a)(2)(C)'s mandate that the Court's scheduling order trumps any of
29 the default expert report deadlines set forth in Rule 26. Rule 26(a)(2)(C) states that
30 "[a] party must make these disclosures at the times and in the sequences that the
31 court orders." The Rule further states that the default 90-day deadline applies only
32 "[a]bsent a stipulation or court order." Fed. R. Civ. P. 26(a)(2)(C). Nothing in the
33 Federal Rules conflicts with this Court's order that expert reports be exchanged at

34 ⁷ *Sony v. Westinghouse*, Case No. 2:08-cv-03934-RGK-FMO, involved the
35 same patents-in-suit that are at issue in this case.

1 the Final Pre-Trial Conference.

2 Vizio contends its proposed schedule would permit the parties to conduct
3 expert discovery “in an efficient and orderly manner.” But Vizio’s proposed
4 schedule is no more efficient or orderly than the schedule chosen by the Court,
5 which provides for expert reports (if any) to be exchanged at the January 10, 2010
6 Final Pre-Trial Conference. If any expert depositions are necessary, Sony would
7 stipulate – subject to the Court's approval – that such depositions could be taken
8 during the week of January 11 or January 18.

9 Finally, Vizio argues that “[t]his Court in prior cases has ordered the type of
10 expert discovery schedule that Vizio is proposing.” However, this Court typically
11 schedules expert discovery in patent cases exactly as it has done in this case. *See*
12 *Arko Development Limited v. Little Kids, Inc.*, 2:08-cv-04048-RGK-AGR (C.D.
13 Cal.) (Docket No. 24 at 3); *Barracuda Networks Inc. v. Trend Micro Inc.*, 2:08-cv-
14 04369-RGK-CW (C.D. Cal.) (Docket No. 44 at 3); *KYE Systems America Corp. v.*
15 *RadioShack Corp.*, 2:08-cv-05579-RGK-FFM (C.D. Cal.) (Docket No. 55 at 3).
16 The one case Vizio cites, *Katz Interactive Call Processing*, 2:07-ml-01816-RGK-
17 FFM, is wholly inapposite as it was a centralized multidistrict litigation involving
18 more than 30 lawsuits against more than 150 defendants. Discovery in that case
19 was so complicated that it required the appointment of a special discovery master.
20 (6/14/2007 Order, Case No. :07-ml-01816-RGK-FFM (Docket No. 28).) *Katz* is
21 the exception that proves this Court’s usual rule that expert reports, if any, are to be
22 exchanged at the Final Pre-Trial Conference.

23 **C. VIZIO’S POSITION REGARDING DEPOSITIONS OF SONY**
24 **WITNESSES IN THE UNITED STATES**

25 Vizio properly noticed Sony’s 30(b)(6) and 30(b)(1) depositions in the
26 United States. As an initial matter, Vizio may choose the place for deposing Sony
27 witnesses, subject to the granting of a protective order by the Court under Rule
28 26(c)(2) designating a different place. Fed. R. Civ. P. 26(c)(2); 8A Wright &

1 Miller, *Federal Practice and Procedure*, § 2112 (2008); *Lexington Ins. Co. v.*
2 *Commonwealth Ins. Co.*, No. C98-3477CRB(JCS), 1999 WL 33292943, at *9
3 (N.D. Cal. Sept. 17, 1999) (citing *Turner v. Prudential Ins. Co.*, 119 F.R.D. 381,
4 383 (M.D.N.C. 1988)). Nevertheless, because Sony has delayed addressing Vizio's
5 discovery concerns, Vizio has no choice but to bring this motion to address this
6 pressing issue now. Vizio has noticed the depositions at-issue for August and
7 September, 2009, and October 2009 is the month of discovery. As explained in
8 more detail below, Sony should neither be surprised nor inconvenienced by its
9 obligation to appear for depositions here, in the Central District of California,
10 where Sony filed suit.

11 **1. Sony Chose This District As A Forum For This Dispute, And**
12 **Cannot Refuse To Produce Witnesses Here**

13 The fact that Vizio expects Sony's witnesses to appear for deposition in the
14 United States should come as no surprise: plaintiffs are usually *required* to make
15 themselves available for examination in the districts in which they filed suit. "As a
16 normal rule, *plaintiff will be required to make himself or herself available for*
17 *examination in the district in which suit was brought. Since plaintiff has selected*
18 *the forum, he or she will not be heard to complain about having to appear there*
19 *for a deposition.*" 8A Wright & Miller, *Federal Practice and Procedure*, § 2112
20 (2008). Indeed, Courts routinely compel plaintiffs to make themselves available for
21 deposition in the United States. *See, e.g., HTC Corp. v. Tech. Props.*, Nos. C08-
22 00882 JF (HRL), 08-00877-JF, 08-00884-JF, 2008 WL 5244905, at *2 (N.D. Cal.
23 Dec. 16, 2008) (granting motion to compel deposition of Taiwanese 30(b)(6)
24 witnesses in California); *Cadent Ltd. v. 3M UniTek Corp.*, 232 F.R.D. 625, 630
25 (C.D. Cal. 2005) (compelling depositions of Israeli 30(b)(6) witnesses in
26 California); *Lexington*, 1999 WL 33292943, at *9 (requiring plaintiffs' corporate
27 witnesses from England to appear in California); *see also United States v. Rock*
28 *Springs Vista Dev.*, 185 F.R.D. 603, 604 (D. Nev. 1999) ("A plaintiff . . . cannot

1 invoke the mere fact inconvenience or expense as a legitimate reason to refuse to
2 appear and submit himself or herself to questioning by the defendant regarding the
3 basis for the claim.”); *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F. Supp.
4 416, 422 (E.D. Wash. 1976) (rule applies to plaintiff’s agents and employees).

5 In *HTC Corp.*, the district court granted defendants’ motion to compel
6 30(b)(6) depositions of witnesses for a Taiwanese plaintiff in the United States.
7 2008 WL 5244905 at *2. Though the Taiwanese plaintiff cited authority for the
8 proposition that “the deposition of a corporate party should be taken at its place of
9 business,” the district court correctly noted that “courts primarily apply this rule to
10 *defendants*, since plaintiffs have the luxury of choosing the forum.” *Id.* (citing
11 *Lexington*, 1999 WL 33292943 at *9) (emphasis added). The rule does not apply to
12 plaintiffs, “[e]specially here, where plaintiffs not only chose this forum, but fought
13 for it because it was more convenient for its [Taiwanese] witnesses to travel
14 to” *Id.* The district court then found that “it will be less costly and disruptive
15 to have all [of the Taiwanese plaintiff’s] 30(b)(6) designees deposed in this
16 district.” *Id.*

17 Likewise, Sony must accept the consequences associated with its decision to
18 choose the Central District of California as a venue and it must produce its
19 witnesses here. Not only did Sony choose this venue, but like the Taiwanese
20 plaintiff in *HTC Corp.*, Sony fought hard for transfer here as a convenient venue for
21 its Japanese witnesses. In particular, Sony argued that

- 22 • this District “is a much more convenient forum” for “non-party
23 witnesses in the case resid[ing] in Asia, including . . . many of the
24 inventors of the patents” making “Los Angeles . . . more convenient
for all involved[;]”
- 25 • “California is also more convenient for [Sony]” because “Sony
26 Corporation’s engineers, some of whom are inventors of the patents-
27 in-suit, are located in Japan[;]” and
28

- for the convenience of the witnesses, this forum was convenient because “[m]ost of the key witnesses . . . likely to testify in this litigation . . . reside either in California or in Asia”.

Brief of Defendant at 21-23, *Vizio, Inc. v. Sony Corp.*, No. 2:08-cv-05029-FSH-PS [Dkt. #26-2] (D.N.J. Jan. 23, 2009) (Ex. 10.) Having purposefully availed itself of this venue by filing its complaint here and having strenuously argued that this venue was convenient to Japan, Sony should be required to produce its witnesses here.

2. Efficiency Factors Strongly Favor Depositions Of Sony Witnesses In The United States

As already noted, courts routinely grant motions to compel depositions of foreign plaintiffs in United States courts based on considerations of convenience. *See, e.g., HTC Corp.*, 2008 WL 5244905 at *2; *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, No. C07-03952 JW (HRL), 2008 WL 1766758 (N.D. Cal. Apr. 15, 2008); *Cadent*, 232 F.R.D. at 630. Here, depositions of Sony’s 30(b)(6) and 30(b)(1) witnesses in the United States will be substantially more efficient and convenient than proposed depositions in Japan according to recognized factors of time and expense and whether inconvenience of travel presents a particular hardship for the deponent. *See New Medium Techs. LLC v. Barco N.V.*, 242 F.R.D. 460, 467-68 (N.D. Ill. 2007) (noting convenience factors; ordering that depositions of Japanese witnesses occur in United States). First, both counsel for Sony and counsel for Vizio are located in the Central District of California. *See Cadent*, 232 F.R.D. at 630 (citing *Resolution Trust Corp. v. Worldwide Ins. Mgmt. Corp.*, 147 F.R.D. 125, 127 (N.D. Tex. 1992)); *Turner*, 119 F.R.D. at 382; *HTC Corp.*, 2008 WL 5244905 at *2; *Louis Vuitton*, 2008 WL 1766758 at *2. Second, Sony does business in this District and is believed to have employees that travel to the United States on a regular basis. *See Cadent*, 232 F.R.D. at 630; *see also New Medium Techs.*, 242 F.R.D. at 467-68; *cf. Louis Vuitton*, 2008 WL 1766758 at *2. Indeed, in a companion case in the Southern District of California involving these two

1 parties, Sony brought a representative from Japan for an Early Neutral Evaluation
2 (“ENE”) and Scheduling Conference on July 29, 2009.

3 Finally, conducting depositions in the United States vastly simplifies the
4 logistics of the Court’s resolution of any disputes, as well as avoids any potential
5 conflict of laws issues. *See New Medium Techs.*, 242 F.R.D. at 467 (noting
6 proposed depositions in Japan would take place in the middle of the night in United
7 States); *Minn. Mining & Mfg. Co. v. Dacar Chem. Prods. Co.*, 707 F. Supp. 793,
8 794-95 (W.D. Pa. 1989) (“[A]s a rule depositions should be taken in the district
9 where the action is being litigated. This not only permits predictability in
10 prospective litigation, it also pragmatically permits the trial court to resolve
11 disputes which may take place during the course of deposition[s] without undue
12 expenditure of time.”); *see also HTC Corp.*, 2008 WL 5244905 at *2 (quoting
13 *Delphi Auto. Sys., LLC v. Shinwa Intern. Holdings LTD*, 2008 WL 2906765 at *2
14 (S.D. Ind. 2008) (“If a federal court compels discovery on foreign soil, foreign
15 judicial sovereignty may be infringed, but when depositions of foreign nationals are
16 taken on American or neutral soil, courts have concluded that comity concerns are
17 not implicated.”); *Custom Form Mfg., Inc. v. Omron Corp.*, 196 F.R.D. 333, 336
18 (N.D. Ind. 2000) (noting potential difficulty for court to resolve discovery disputes
19 if depositions occurred in Japan); *In re Honda Am. Motor Co., Inc. Dealership*
20 *Relations Litig.*, 168 F.R.D. 535, 539-540 (D. Md. 1996) (“Both comity and judicial
21 economy require the deposition of Honda Japan’s managing agents in Baltimore,
22 Maryland.”). In sum, the balance of convenience factors strongly favors
23 depositions of Sony witnesses in the United States.

24 **3. The Court’s Scheduling Order Is Silent Regarding Where** 25 **Sony’s Witnesses Should Be Deposed**

26 Sony erroneously attempts to justify its refusal to produce witnesses in the
27 United States based on the fact that this Court’s Scheduling Order (Dkt. #48) “did
28 not adopt Vizio’s invitation to ‘require’ the Japanese residents to travel to the

1 United States.” (Ex. 8 at 2.) But the Court did not adopt Sony’s position, either.
2 (See Dkt. #44 at 11 (stating that “Sony proposes that depositions be conducted in
3 that specific witness’ country of residence.”).) Instead, the Court simply did not
4 rule on the question of where the depositions of Sony’s witnesses would be taken.
5 (See Dkt. #48 (prescribing timing of depositions).) Rather, the Court encouraged
6 the parties to work together to resolve these issues, but they have been unable to
7 reach an agreement.

8 For the foregoing reasons, Vizio requests that Sony be compelled to make its
9 30(b)(6) and 30(b)(1) witnesses available for deposition in this District.

10 **D. SONY’S POSITION REGARDING DEPOSITIONS OF SONY**
11 **WITNESSES IN THE UNITED STATES**

12 **1. Because Vizio Failed to Have a Local Rule 37-1 Conference**
13 **of Counsel Regarding this Issue, Vizio’s Motion Must be**
14 **Denied.**

15 As discussed above, Vizio’s motion to compel Sony to produce all of its
16 Japan-based witnesses in this district must be denied because Vizio failed to hold
17 an in-person conference of counsel about this issue, as required by Local Rule 37-1.
18 If Vizio had complied with its Local Rule 37-1 obligations, the parties might have
19 been able to resolve their differences instead of wasting the Court’s resources on
20 this unripe issue. Vizio’s failure to meet with Sony is not a mere technical
21 deficiency. If the parties had conferred after Vizio served its 30(b)(6) deposition
22 notice, Sony could have explained that Vizio’s concerns about taking a 30(b)(6)
23 deposition in Japan were unwarranted. Sony will make 30(b)(6) designees
24 available for deposition in the United States.⁸ Indeed, in the *Westinghouse* case, *all*
of the witnesses Sony designated for Westinghouse’s 30(b)(6) topics resided in the

25 ⁸ Vizio’s Motion is directed to the location of depositions only and does not
26 purport to address the specific merits of each of its deposition notices. Sony is
27 preparing objections to those notices (both 30(b)(6) and personal) and intends to
28 work with Vizio through the meet and confer process in an attempt to resolve
specific disputes relating to the notices. Sony reserves all of its objections and its
right to seek relief from the Court, including a protective order, in connection with
the notices.

1 United States. Accordingly, Vizio's assertion that "there is no chance of resolving
2 this issue absent intervention from the Court" is wrong.

3 **2. Even if Vizio's Motion Were Proper, It Should Be Denied**
4 **On The Merits.**

5 In addition to violating the Local Rule procedures, Vizio has offered no
6 legitimate basis for a blanket order requiring Sony to make all of its Japan-based
7 witnesses available for deposition in Los Angeles. Vizio's request fails to consider
8 the cost and efficiencies of bringing individual witnesses to this district, particularly
9 in light of the specific testimony that each such witness is anticipated to provide
10 and its importance to the case.

11 As for the nine Japan-based inventors whose depositions Vizio recently
12 noticed, the relative costs and efficiencies of having a small number of lawyers
13 from each side make one or two trips to Japan to depose these witnesses clearly
14 outweighs the much larger cost and inconvenience of bringing this large group of
15 witnesses to California for their depositions. The presumption is that a deponent
16 will be deposed at his residence. *Zakre v. Norddeutsche Landesbank Girozentrale*,
17 No. 08-civ-257(RWS), 2003 WL 22208364, *2 (S.D.N.Y. Sept. 23, 2003); *Six*
18 *West Retail Acquisition Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 107
19 (S.D.N.Y. 2001). This can only be overcome by a showing that factors of cost,
20 convenience, and litigation efficiency militate in favor of an alternate location. *Id.*
21 Vizio has not shown this. Vizio offers no compelling reason why it would be more
22 efficient for Sony to bring all of these witnesses to Los Angeles for deposition,
23 when it would obviously be far less expensive for one or two of each side's lawyers
24 to travel to Japan to take these depositions in one or two coordinated trips.
25 Although Sony has offered to work with Vizio to book time at the U.S. Consulate
26 in Japan for such a trip, thus far Sony's efforts have been rebuffed. (Belville Decl. ¶
27 7).
28

(i) **Vizio Has Not Cited Any Authority That Supports An All-Inclusive, Blanket Rule.**

Vizio's contention that a plaintiff must come to the forum for a deposition “is at best a general rule, and is not adhered to if plaintiff can show good cause for not being required to come to the district where the action is pending.” 8A Wright & Miller, *Federal Practice and Procedure*, § 2112 (2008). “A district court has wide discretion to establish the time and place of depositions.” *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994).

Moreover, the authority Vizio cites actually undercuts its position that *all* Japan-based Sony witnesses, regardless of circumstances, should be required to travel to California for deposition. In *HTC Corp. v. Tech. Properties*, Civ. No. C08-00882-JF(HRL), 2008 WL 5244905 at *2 (N.D. Cal. Dec. 16, 2008), the court refused to issue an open-ended, blanket order requiring all foreign witnesses to appear in the United States. Instead, the court noted that “the court cannot contemplate every possible factual scenario that may arise as to a particular deponent and the possible unfairness or unreasonableness of him or her having to travel to the Northern District of California.” *Id.* at *2. Thus, the Court ordered that the parties could separately move with respect to individual depositions. *Id.* Similarly, in *Cadent Ltd. v. 3M UniTek Corp.*, 232 F.R.D. 625, 630 (C.D. Cal. 2005), the Court considered the circumstances and concluded that “Israel may be a dangerous place to hold depositions.” In *United States v. Rock Springs Vista Dev.*, the court acknowledged that the rule requiring a plaintiff to make itself available in the forum “is at best a general rule, and is not adhered to if plaintiff can show good cause for not being required to come to the district where the action is pending.” 185 F.R.D. 603, 604 (D. Nev. 1999), (quoting Wright & Miller, *Federal Practice and Procedure* § 2112 (1994)). These cases show that each witness living abroad is entitled to an analysis of his or her individual circumstances before he or she is required to travel to the United States for a deposition.

The fault in Vizio’s approach is clear from Vizio’s argument that Sony’s witnesses should be deposed in the United States, and would not be burdened by such depositions, simply because Sony brought a representative from Japan to an Early Neutral Evaluation and Scheduling Conference in San Diego. (*see supra* Section III.C.2.) The Sony representative who came from Japan is a Sony senior manager whose responsibilities include oversight of U.S. patent litigation and licensing, and is not among those Sony employees noticed for a deposition. (Belville Decl. ¶ 11.) The fact that this particular Sony employee would not be burdened by a deposition in California does not bear on whether all Sony employees, such as an inventor whose responsibilities are largely confined to research facilities in Japan, would be burdened by similar travel.

This Court should reject Vizio's invitation to order that all Japan-based Sony witnesses be deposed in California, without regard to their individual circumstances. Not only would such a result be burdensome to the witnesses whose depositions have already been noticed, but also Vizio would have little incentive to exercise restraint in noticing the depositions of additional witnesses who reside in Japan, at significant cost and inconvenience to those witnesses and to Sony. Accordingly, Vizio's motion should be denied.

(ii) Contrary to Vizio's Position, Efficiency Factors Strongly Favor Depositions of Sony Witnesses in Japan.

Although Vizio argues that deposing Sony's witnesses in California would be more convenient, Vizio fails to take into account that it is seeking the deposition of at least nine witnesses based in Japan. Contrary to Vizio's assertion, it would be more convenient, less time-consuming, and less expensive for one or two Sony and Vizio attorneys to fly to Japan and depose the witnesses than to have nine witnesses fly from Japan to the United States. *See In re Air Crash at Taipei, Taiwan*, Case No. MDL-1394-GAF, 2002 WL 32155478 (C.D. Cal. Nov. 6, 2002) (finding deponent's absence from Singapore for a deposition in the United States might

1 adversely affect the corporation's operations and interfere with the deponent's
2 duties); *Zakre v. Norddeutsche Landesbank Girozentrale*, No. 08-civ-257(RWS),
3 2003 WL 22208364, *2 (S.D.N.Y. Sept. 23, 2003) (“While it is true that all counsel
4 would be inconvenienced by traveling to Germany, ‘the convenience of counsel is
5 less compelling tha[n] any hardship to the witnesses.’” (quoting *Six West Retail*
6 *Acquisition Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 108 (S.D.N.Y.
7 2001))); *Realuyo v. Diaz*, No. 98CIV7684(JGK), 2000 WL 687585, *2-*3
8 (S.D.N.Y. May 26 2000) (deposition to take place in South Korea because it would
9 be extremely burdensome for the deponent to miss nearly a week of work).

10 Additionally, Sony is also willing to work with Vizio to make the nine Japan-
11 based inventors available for deposition at the consulate in Japan in a manner that
12 avoids the need for Vizio's lawyers to make multiple trips to Japan. Since
13 depositions in Japan must take place at the United States Embassy or at the
14 Consulate in Osaka-Kobe, the parties can reserve a block of time to depose all of
15 Sony’s witnesses, instead of haphazardly scheduling the depositions of Sony
16 inventors in the United States. When considering the time and expense of deposing
17 in the United States each of these witnesses who reside in Japan, it would be more
18 convenient for the parties, and for the witnesses, to proceed with depositions in
19 Japan.

20 Vizio contends it is more efficient for foreign witnesses to be deposed in this
21 district in the event disputes arise that need to be resolved by the Court. But the
22 involvement of a court directly into a dispute during a deposition is a highly
23 unusual situation that should not override the other factors of cost and convenience
24 for the witness. This is particularly true here where the parties have already agreed
25 to extend the normal one-day deposition to two days for witnesses who testify
26 through a translator. Thus, even if an irreconcilable dispute were to arise during a
27 deposition in Japan, there is no reason why the parties could not involve the court
28 and reach a resolution before the deposition had concluded. Moreover, even for

1 depositions taken overseas, the Court, has jurisdiction over the parties and can
2 compel them to proceed in a particular manner.

3 (iii) **Sony's Choice of Forum in California Does Not**
4 **Require Sony's Japan-Based Witnesses to**
Travel to California For Their Depositions.

5 With respect to Vizio's argument that Sony's choice of the Central District
6 favors having all of the depositions conducted here, Vizio ignores that Sony filed
7 this case here in large part because: a) Sony's U.S. TV business is located in San
8 Diego and Sony has offices in the Los Angeles area; b) Sony's action against
9 Westinghouse involving the same patents-in-suit was pending here; and c) this is a
10 convenient venue because Vizio is headquartered in Irvine, CA and its supplier,
11 AmTRAN uses this district for its distribution network. "If plaintiff has sued in a
12 court far distant from home because the transactions in question occurred in that
13 district, and a suit elsewhere would probably have been transferred in any event, the
14 usual rule requiring plaintiff to come to the forum for his or her deposition seems
15 inappropriate." 8A Wright & Miller, *Federal Practice and Procedure*, § 2112
16 (2008). Sony was required to file this lawsuit in California given the dispute's ties
17 to California. Accordingly, Vizio is not entitled to a blanket order requiring all
18 Japan-based Sony witnesses to travel to this district for deposition.

19 Vizio also argues that Sony's witnesses who reside in Japan should be
20 required to travel to California because Sony argued in the New Jersey case that
21 California is a more convenient forum for those witnesses than New Jersey.
22 However, Sony has *never* stated that California is convenient for its witnesses. The
23 fact that California is more convenient than New Jersey is irrelevant to the witness-
24 by-witness analysis that must be performed in order to determine whether the
25 witnesses should be required to come to California. As discussed above, California
26 is not a convenient location for depositions of Sony's witnesses who reside in
27 Japan.
28

1 **IV. CONCLUSIONS**

2 **A. VIZIO'S CONCLUSION**

3 For all of the foregoing reasons, Vizio's motion to compel expert reports and
4 expert depositions and depositions of Sony witnesses in the United States should be
5 granted.

6 **B. SONY'S CONCLUSION**

7 For the foregoing reasons, Sony respectfully requests that the Court deny
8 Vizio's motion to compel a change to the Court's expert discovery schedule and
9 depositions of Sony's Japan-based witnesses in the United States. If the Court
10 grants Vizio's request to have Sony's Japan-based witnesses deposed here, Sony
11 requests that the Court require Vizio to live up to its prior agreement to have non-
12 Japan based witnesses deposed where they reside.

13
14 Dated: August 12, 2009

JONES DAY

15
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17 Steven J. Corr

18 Attorneys for Defendant VIZIO, INC.

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